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SUPREME COURT, U.S.

No. 07-1079

In The

Supreme Court of the United States

AZEEZ P. ADEDUNTAN, M.D. and
VICTORY VASCULAR & GENERAL SURGERY OF GEORGIA, P.C.,

Petitioners,

v.

HOSPITAL AUTHORITY OF CLARKE COUNTY D/B/A ATHENS REGIONAL MEDICAL CENTER, ET AL.

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether an order is final pursuant to 28 U.S.C. §1291 under the "bright-line rule" articulated by this Court in Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 1721 (1988), when liability for attorney's fees pursuant to a prevailing party clause in a contract has already been found, and only the amount of fees remains pending in the trial court.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioners

Azeez P. Adeduntan, M.D.

Victory Vascular and General Surgery of Georgia, P.C.

No parent or publicly held company owns 10% or more of the stock of Petitioner Victory Vascular & General Surgery, P.C.

Respondents

Athens Regional Health Services, Inc.

Athens Regional Medical Center, Inc.

Athens Vascular Surgery, P.C.

Mark J. Costantino, M.D.

Hospital Authority of Clark County d/b/a Athens Regional Medical Center

David M. Sailors, M.D.

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REPLY TO BRIEF IN OPPOSITION

Petitioners respectfully submit this Reply to Brief in Opposition to their Petition for Writ of Certiorari.

Contrary to the assertion made by Respondents, Petitioners respectfully submit that this matter presents the ideal case for this Court to clarify its holding in Budinich v. Becton Dickinson & Co., 486 U.S. 196, 108 S. Ct. 1717 (1988), and definitively hold that a decision on the merits is a "final decision" for purposes of §1291, whether or not there remains for adjudication a **contractual or statutory** request for attorney's fees attributable to the case.

Respondents assert three unavailing new reasons why this Court should forego the opportunity presented by this case to conclusively resolve the circuit split and to clarify for courts and litigants the bright-line rule.

The issue presented here is ***whether*** the appeal will be heard, and not *when* it will be heard, as argued by Respondents. The issue presented in the Petition is relevant to the outcome of the case, and potentially could result in Petitioners having no remedy at all. The real risk here is that this Court could later clarify Budinich to deviate from the rule articulated in Brandon, Jones, Sandall, Zeide, Cohn, Chalal & Musso, P.A. v. MedPartners, Inc., 312 F.3d 1349 (11th Cir. 2002) before there is an award of attorney's fees for Dr. Adeduntan to appeal, and Dr. Adeduntan will be left without any ability to appeal anything except the amount of fees awarded. The Eleventh

Circuit could abandon its contrary rule and join the majority of other circuits in following the bright-line rule articulated in Budinich, making any subsequent appeal of substantive issues by Dr. Adeduntan untimely. Respondents acknowledge this possibility, stating:

> . . . if a party followed the Eleventh Circuit rule as to the time for appeal in a circuit which has adopted or then adopts a contrary rule, **the resulting appeal would be untimely, and would be dismissed with prejudice.**

Br. in Opp'n at 6 (emphasis added). If Petitioners appeal after the fee award, Petitioners will not then argue that their subsequent appeal is untimely under Budinich.

In an attempt to distinguish the facts of this case with those in Budinich, Respondents argue that the ARMC Defendants' counterclaim for attorney's fees arose from an alleged breach of contract, and thus, the amount of the fees yet to be decided is purportedly part of the merits of the case. Br. in Opp'n at 7. However, the counterclaim does not allege a breach of contract, but rather asserts entitlement to attorney's fees and costs incurred in defending against Petitioners' claims **in this litigation** pursuant to a prevailing party fee-shifting provision in a document entitled "Applicant's Consent and Release" ("ACR") (Pet. App. F) executed by Dr. Adeduntan in connection with his appointments to the medical staff at Athens Regional Medical Center. The trial court has already decided the

liability for such fees and costs, leaving only the determination of the amount. Contrary to Respondents' argument, the ACR does not contain an agreement not to sue. The provision upon which the ARMC Defendants rely in support of their counterclaim provides:

> If, notwithstanding the provisions in this Section D, I institute legal action against the Hospital and/or its Medical Staff and do not prevail, I agree to reimburse the Hospital and any Medical Staff members named in the action for any and all costs incurred in defending such legal action, including reasonable attorney's fees.

Pet. App. F, 9-10. The ACR provides that the foregoing was only in effect while Dr. Adeduntan was on staff, and he filed this suit after he was no longer on staff. Id. at 5. Moreover, this Court in Budinich stated in part:

> . . . what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits,' but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

Budinich, 486 U.S. at 202.

Respondents argue the Eleventh Circuit's

opinion in this case is unpublished and will have no significant impact on future cases. Because the Eleventh Circuit's opinion is unpublished, courts, litigants and their counsel remain without clear guidance as to when their judgment is final.[1] Absent clarification, lawyers will continue to file notices of appeal and request costs as prophylactic measures given the current uncertainty.

If a bright-line rule was intended by Budinich, then that line must not be gray. This case presents the Court with the unique opportunity to clarify Budinich, and rule whether "a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case," Budinich, 486 U.S. at 202-203, whether arising from statute, law, or contract.

Respondents cite cases for the proposition that the controlling factor in whether an order is a "final decision" is the subjective intent of the trial court. Br. in Opp'n at 8-13. An order disposing of the merits and leaving only the ministerial act of determining the amount of attorney's fees under a contractual prevailing party clause reflects a clear and unequivocal

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[1] As evidence of the uncertainty faced by litigants, the AVS Defendants filed a Bill of Costs fourteen days after the trial court vacated its alleged inadvertently entered judgment. Because the AVS Defendants cannot request costs until entry of a final judgment, the AVS Defendants effectively acknowledged the finality of the trial court's September 21, 2006 order.

manifestation by the trial court that the case is over.

Diaz-Reyes v. Fuentes-Ortiz, 471 F.3d 299 (1st Cir. 2006) involved Title VII individual and official capacity claims. The trial court's order dismissed the claims to the extent they asserted individual capacity claims, but failed to mention the official capacity claims, and defendants never sought dismissal of the official capacity claims. Id. at 301. The appellate court determined *sua sponte* that it lacked jurisdiction under § 1291 since the official capacity claims remained pending and the trial court had not intended to completely resolve all pending claims. Id.

Fiataruolo v. United States, 8 F.3d 930 (2d Cir. 1993) was a suit brought by taxpayers seeking a refund of penalties assessed by the IRS. The jury found for the taxpayers, the trial court entered judgments for the taxpayers, but omitted the amount of the monetary awards. Id. at 936. The appellate court concluded the lack of reference to a specific amount of money alone will not render a judgment non-final. Id. at 937. After concluding jurisdiction under §1291 existed, the court affirmed the judgment and remanded the case to "complete the ministerial task of calculating the dollar amounts of the awards." Id. at 942. Fiataruolo supports a finding that the lack of a determination by the trial court as to the amount of attorney's fees purportedly due the under the ACR does not render the trial court's order disposing of the merits of the case non-final.

In Reinholdson v. State, 346 F.3d 847 (8th

Cir. 2003), nine disabled students sued for violations of the Individuals with Disabilities Education Act. The trial court dismissed all claims, but expressly denied the school district defendant's motion to dismiss plaintiffs' administratively exhausted claims. Id. at 849. The ambiguity created as to the finality of the order was the fact that the trial court entered an order severing the exhausted claims of the nine-named plaintiffs and directing them to refile those claims in separate actions. Id. The appellate court determined that the trial court's use of the word "refile" suggested the litigation would continue. Id. at 849-850. The appellate court found that the trial court's memorandum opinion did not clarify that the severance order effectuated a Rule 21 severance of those claims, and otherwise dismiss all other claims, so that the appellate court only had jurisdiction to construe the severance order. Id. at 850.

In Vaughn v. Mobil Oil Exploration & Producing Southeast, Inc., 891 F.2d 1195 (5th Cir. 1990), the appellate court found the judgment handed down by the trial court was final, even though it did not address the cross-claim of the defendant. The appellate court determined the language of the trial court's judgment was specific and heavy with conclusion, and nothing in the trial court's disposition suggested the judgment was incomplete. Id. at 1197. The trial court closed the case, and the clerk entered judgment. Id. Nine months later, defendant "reurged its long-abandoned cross-claim" by filing a motion to set aside judgment

pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Id. at 1198. The court stated that even when it was contrary to defendant's interests, defendant treated the earlier judgment as final. The AVS Defendants in the instant matter filed their Bill of Costs after the trial court had vacated its allegedly premature judgment, which demonstrates that even they thought the trial court's order was final.

In an unpublished decision, the appellate court in Russell v. Watkins Ludlam Winter & Stennis, P.A., 181 Fed. Appx. 441 (5th Cir. 2006) concluded it lacked jurisdiction to hear the appeal from a dismissal without prejudice because the defendant raised the issue that the trial court did not set forth the judgment on a separate document in accordance with Federal Rule of Civil Procedure 58, and the trial court's order did not end the litigation on the merits. Here, the trial court's September 21, 2006 Order resulted in the disposition on the merits of all pending claims then asserted.

In the unpublished decision cited by Respondents, Korenica v. SSA, 207 Fed. Appx. 888 (9th Cir. 2006), plaintiff appealed the trial court's denial of cross-motions for summary judgment. The appellate court concluded that it was without appellate jurisdiction because "[w]ith limited exceptions, the denial of summary judgment is a non-appealable, non-final order." Id. at 889.

The case of Warren v. Am. Bankers Ins., 507 F.3d 1239 (10th Cir. 2007) cited by

Respondents does not even address the issue of whether a trial court's order is a final decision for purposes § 1291.

Respondents cite the case of Harbor Ins. Co. v. Trammell Crow Co., 854 F.2d 94 (5th Cir. 1988) for the proposition that a trial court has the discretion to treat a summary judgment order as interlocutory. The Fifth Circuit in Treuter v. Kaufman County, Texas, 864 F.2d 1139 (5th Cir. 1989) explained its earlier decision in Harbor Ins. Co. and stated that it had carved out an exception to the "*Budinich* rule of appealability of decisions by a district court where the district court has not yet determined the specific amount of attorney's fees and expenses to be awarded." Id. at 1143. The Fifth Circuit explained its conclusion in Harbor Ins. Co. stating:

> . . . regardless of whether a request for attorney's fees remains for adjudication, where the district court's judgment on the merits is labeled 'interlocutory' and the district court specifically provides in the judgment that the judgment is an interlocutory judgment only, the time for filing a notice of appeal does not commence until the district court renders a final judgment resolving the attorney's fees issue.

Treuter v. Kaufman County, Texas, 864 F.2d at 1143. Harbor Ins. Co. presented unique facts where the trial court specifically labeled its judgment as "interlocutory." Notwithstanding the exception created by the Fifth Circuit in Harbor

Ins. Co. due to the unique facts, the Fifth Circuit continues to follow Budinich. The orders entered by the trial court in this case contain no similar designations.

Respondents next argue that because the AVS Defendants filed a Motion for Leave to File an Amended Answer and Counterclaim, which the trial court has not ruled upon, substantive issues remain and prevent the summary judgment order from being a final decision. Respondents fail to advise the Court that the subject motion was untimely. In the trial court's initial Joint Scheduling/Discovery Order of October 19, 2004, the court stated all amendments to the pleadings must be made thirty (30) days prior to the end of discovery. See Reply App. A-2. The discovery cutoff was originally set for February 28, 2005, but the court later amended the deadline and set the date for March 31, 2006. Id. at 3; See also Reply App. B-2. The AVS Defendants failed to timely file their motion one month prior to the end of discovery pursuant to the orders of the court, and waited until October 13, 2006, after the close of discovery and after the trial court had disposed of all substantive issues in this case. The trial court likewise denied Petitioners' motion to conduct additional discovery beyond the single peer review at issue, and granted summary judgment against Petitioners on the existing record on all pending claims.[2] Pet. App. C. The Eleventh

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[2] After this case was briefed in the Eleventh Circuit, it decided Adkins v. Christie, et al., Case No. 06-13107 (11th Cir. June 12, 2007), finding the trial court erred by limiting

Circuit has held that prejudice and undue delay are inherent in an amendment asserted after the close of discovery and after dispositive motions have been filed, briefed, and decided. Pines Props. v. Am. Marine Bank, 156 Fed. Appx. 237, 241 (11th Cir. 2005); Campbell v. Emory Clinic, 166 F.3d 1157, 1162 (11th Cir. 1999); Jameson v. Arrow Co., 75 F.3d 1528, 1534 (11th Cir. 1996).

Respondents argue the need for the trial court to show some clear and unequivocal manifestation that its decision is final. The fact that the court has never ruled upon the AVS Defendants' leave motion manifests the court's intent that its summary judgment order disposing of the merits was a final decision. The trial court denied Petitioners' Motion for Reconsideration the same day it was filed. The AVS Defendants submitted a Bill of Costs, even after the trial court vacated an allegedly premature judgment, evidencing the AVS Defendants' belief that the summary judgment order was a final decision.

Respondents also cite the Fourth Circuit's holding in Carolina Power and Light Company v. Dynegy Marketing and Trade, 415 F.3d 354 (4th Cir. 2005) and the Eighth Circuit's decision in Maristuen v. National States Ins. Co., 57 F.3d 673

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production to peer review documents of surgical department physicians during a five-year period, rather than documents covering all physicians on staff during the seven years requested by plaintiff. Here, the trial court manifested its intent to resolve all claims then pending on the record without further discovery beyond the AAA surgery aspect of one peer review, prohibiting discovery on other ARMC peer reviews of Adeduntan.

(8th Cir. 1995). Carolina Power presents a divided legal analysis of the "final decision" issue as to a pending determination of attorney's fees. The primary opinion declines to follow Budinich in the context of a contract-based claim for attorney's fees, based upon the 1993 amendments to Federal Rules of Civil Procedure 54 and 58. In contrast, the concurring opinion notes that:

> . . . as inferior federal judges, we are hardly free to disregard [Budinich] . . . . [N]ever allowing an immediate appeal could actually lead to wasteful litigation depending on the nature of the contractual provision. If the appellate court reverses the district court's determination as to who prevailed, the district court's attorneys' fees determination becomes unnecessary (if the contractual provision provided for fee shifting in more than one direction) or will have to be repeated (if the contractual provision provided for fee shifting in either direction) . . . .

Carolina Power and Light Company, 415 F.3d at 363.

Maristuen presented another unique factual scenario. The plaintiff insured filed suit against the defendant alleging breach of contract of insurance and of the covenants of good faith and fair dealing implied in every insurance contract under North Dakota law. Id. at 675. In addition to contract and bad faith damages, the plaintiff sought punitive damages, exemplary damages,

and damages under federal and state RICO statutes. Id. In the first stage of trial, the jury awarded plaintiff contract damages plus prejudgment interest. Id. The jury also found that the defendant had breached its duty of good faith and awarded bad faith damages in the form of litigation expenses. Id. The jury set the amount of litigation expenses but did not quantify the attorney fees because the parties had agreed that the amount of attorney fees would be set by the court. Id. In the second stage, the jury awarded plaintiff punitive damages, and the trial court subsequently entered judgment on these verdicts. Id. The trial court later quantified the amount of fees as per the agreement of the parties and amended the judgment. Id. Defendant appealed, and plaintiff sought dismissal of the appeal as untimely, arguing that the earlier judgment was final and started the clock on filing the notice of appeal. The appellate court in Maristuen distinguished the case from Budinich stating "[t]his case differs from *Budinich* and the other cases cited above because the award of unquantified attorney fees here **is set out in and is an integral part of the judgment** entered by the District Court in accordance with the jury's verdicts." Id. at 677 (emphasis added).

The Eleventh Circuit seemingly seeks guidance in this matter stating: "For better or for worse, whether wrong or right, MedPartners is binding panel precedent that we must follow until this Court sitting en banc, or the Supreme Court, decides otherwise in a case that presents the contract-attorney's fees issue. [internal citation

omitted]." Pet. App. D-8-9.

This is the perfect case for this Court to now clarify the split between circuits as to the application of Budinich.

CONCLUSION

Based upon the foregoing, the Petitioners respectfully request that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

AZEEZ P. ADEDUNTAN,
VICTORY VASCULAR & GENERAL
SURGERY OF GEORGIA, P.C.

Plaintiffs,

vs. CASE NO. 3:04-CV-65 (CDL)

HOSPITAL AUTHORITY OF CLARKE
COUNTY d/b/a ATHENS REGIONAL
MEDICAL CENTER, et al.,

Defendants.

JOINT PROPOSED
SCHEDULING/DISCOVERY ORDER

Pursuant to Federal Rule of Civil Procedure 26(f), a conference was held on October 5, 2004, between Michael Terry, counsel for Hospital Authority of Clark County d/b/a Athens Regional Medical Center, Athens Regional Medical Center, Inc. and Athens Regional Health Services, Inc., Benton J. Mathis, Jr. and Gary Blasingame, counsel for Athens Vascular Surgery, P.C., David M. Sailors, M.D., and Mark J. Costantino, M.D. and Lawrence Newlin, counsel for Plaintiffs. In accordance with Federal Rules of Civil

Procedure 16(b) and 26(f), and this Court's Rules 16 and 26 Order of September 3, 2004, the parties hereby submit their joint consolidated report and proposed scheduling and discovery order.

I. SCHEDULING

(a) Joinder and Amendments.

At this time, the parties do not anticipate joinder of additional parties or amendment of the pleadings. Should discovery reveal that Plaintiffs have claims against additional parties, Plaintiffs will promptly act to add those parties to this case. Should discovery reveal that Defendants have any additional affirmative defenses, Defendants will promptly add those defenses to this case. The parties agree that absent good cause, joinder and amendments shall be made at least one month prior to the end of discovery.

(b) Filing/Hearing of Motions.

Motions to Compel, if necessary, may be filed at any time up to and including the date on which the discovery period expires unless it is not reasonably possible to do so. The parties agree that all potentially dispositive motions, including summary judgment motions, will be filed within forty-five (45) days after the completion of the discovery period. Motions for summary judgment are due to be filed no later than April 14, 2005. Motions shall be no longer than 30 pages unless ordered by the Court. Respondent has 20 days and 30 pages to respond to the dispositive motion and Movant

shall have 10 days thereafter and no more than 15 pages to file a reply.

(c) Completion of Discovery.

Plaintiffs filed their Complaint on July 1, 2004. Defendants filed their Answers on August 30, 2004, and September 1, 2004, respectively. Thus, pursuant to this Court's Rules 16 and 26 Order, discovery will be completed six (6) months after that date, specifically, February 28, 2005. Further, the parties agree to discuss requesting an extension of time for discovery if, despite exercising due diligence, they have been unable to complete discovery in time.

II. DISCOVERY

(a) Proposed Plan of Discovery.

In accordance with Local Rules 33.1, 34 and 36, a maximum of 25 interrogatories, 10 requests for production of documents, and 15 requests for admissions will be served by each party on another party. Plaintiffs currently anticipate that they will need to exceed the limitation on document production requests. The parties agree to consider moving for an extension of the number of interrogatories, requests for production of documents, and requests for admissions, if either party shows a need for such an extension.

(b) Witnesses to be Deposed.

At this time, Counsel for the respective Defendants anticipate that they will depose the following individual(s):

(1) Plaintiff, Azeez P. Adeduntan -

January 10, 2004

(2) Dr. Herbert Dardik - January 13, 2004

(3) Frank J. Vittimberga, M.D. - January 14, 2004

-Associated Surgeons, P.C., 300 Mount Auburn Street, Suite 407, Cambridge, MA 02138

At this time, Counsel for Plaintiffs anticipates that he will depose the following individual(s):

(1) Dr. Patricia Burgess - 1199 Prince Ave., Athens, GA 30606 - 2 hours

(2) Dr. Steven Bramlet - 154 Melbourne Dr. Athens, GA 30606 - 2 hours

(3) Dr. Mauro Faibicher - 1364 Clifton Rd., Atlanta, GA 30322 - 2 hours

(4) Dr. Cecil Hudson - 2260 Simonton Bridge Rd., Watkinsville, GA 30677 - 7 hours

(5) Dr. Chris E. Malone - 195 King Ave., Athens, GA 30606 - 7 hours

(6) Dr. E.W. Cody Gunn, III - 1270 Prince Ave., Suite 102, Athens, GA 30606 - 7 hours

(7) Dr. David M. Sailors - 195 King Ave., Athens, GA 30606 - 7 hours

(8) Dr. Mark J. Costantino - 195 King Ave., Athens, GA 30606 - 7 hours

(9) Heather Pray - 1199 Prince Ave., Athens, GA 30606 - 1 hour

(10) Heather Haley - 77 Harry Pauls Rd., Danielsville, GA 30633 - 3 hours

(11) Shirley Whitfield - 1329 Garnett Ward Road, Hull, GA 30646 - (706) 353-6806 - 2 hours

(12) Dr. Herbert Dardik - 375 Engle St., Englewood, NJ 07631 - (201) 894-0400 - 5 hours

(13) Dr. Wayne F. Middendorf - 489 N. Milledge Ave., Athens, GA 30601 - 2 hours

(14) Rebecka Ramming - 1940 Bold Springs Rd., NW, Monroe, GA 30656 - (770) 267-7194 - 1 hour

(15) Mildred Gunter - 251 Wilson Dr., Commerce, GA 30529 - (706) 335-4762 - 1 hour

(16) Kristian Walker - 431 Hightower Trail, Jefferson, GA 30549 - (706) 367-4556 - 1 hour

(17) Dr. Fayette M. McElhannon, Jr. - (706) 548-1386 - 1 hour

(18) Dr. D. Hamilton Magill, III - (706) 546-8510 - 3 hours

(19) Representative(s) from St. Mary's Hospital - 7 hours

(20) Dr. Willy E. Zuniga - (706) 795-3301 - 4 hours

(21) Catherine Cole - (706) 543-3264 - 1 hour

(22) Dr. James S. Miller - (706) 546-8510

- 3 hours

(23) Dr. Harvey G. Ouzts - (706) 546-8510 - 2 hours

(24) Sylvia Cooper - (706) 742-5716 - 1 hour

(25) Dr. Thomas J. Murphy - (706) 546-8510 - 1 hour

(26) Frances Atkinson - (706) 546-6545 - 1 hour

(27) Ellis Crawford - (706) 769-6383 - 1 hour

(28) Dr. Susan K. Kreher - (706) 543-8444 - 3 hours

(29) Dr. Gautam Dasgupta - (706) 546-0083 - 4 hours

(30) Dr. Antonio T. DaCunha - (706) 369-5084 - 3 hours

(31) Dr. O. Thompson Cassity, Jr. - (706) 475-3694 - 2 hours

(32) John A. Drew - 1199 Prince Ave., Athens, GA 30606 - 7 hours

Pursuant to Fed. R. Civ. P. 26(b)(2), Defendants object to Plaintiffs' existing intention to take 32 depositions and respectfully request that the Court limit Plaintiffs to 10 depositions. In this regard, Defendants show that a review of the requested depositions reflects that Plaintiffs are seeking to depose individuals that: (1) are not likely to have any knowledge relevant to a claim or defense in this matter; or (2) would

provide unreasonably cumulative and deposition testimony. Additionally, Defendants submit that the information sought from the depositions of these 32 deponents can be obtained from some other less burdensome and less expensive source. Defendants agree that Plaintiffs can petition the Court after completion of the initial 10 depositions if they demonstrate a reasonable and legitimate need for sworn testimony from additional individuals. Defendants show that, after the Court issues its Order regarding the number of depositions Plaintiffs can take, the parties will confer in good-faith to schedule Plaintiffs' allowable depositions.

The parties acknowledge that the date, time and location of the above depositions may change based upon scheduling conflicts that may develop. The parties agree to cooperate in rescheduling any depositions and to provide prompt notice of the new date, time and location of the deposition. The parties also acknowledge that they may schedule additional depositions after conducting discovery in this case.

(c) Initial Disclosures.

The parties are required to serve initial disclosures in accordance with Fed. R. Civ. P. 26(a)(1). The parties agree that they will serve their Fed. R. Civ. P. 26(a)(1) disclosures by

October 19, 2004.

(d) Expert Testimony.

Any party who desires to use the testimony of an expert witness will be required to designate the expert according to the following schedule, so that the expert will be identified sufficiently early in the discover period to give the opposing party the opportunity to depose the expert. If Plaintiffs desire to use the testimony of an expert, they must disclose the identity of the expert within 90 days after the filing of the last answer of the Defendants named in the original complaint (November 30, 2004). If Defendants desire to use the testimony of an expert, they must disclose the identity of the expert within 120 days after the filing of the last answer of the Defendants named in the original complaint (December 30, 2004). In the event Defendants designate an expert where Plaintiffs have not previously designated an expert, Plaintiffs shall have an additional 30 days to designate a rebuttal expert. Any disclosure of an expert witness must be accompanied by a written report prepared and signed by the expert in accordance with the requirements of Fed. R. Civ. P. 26(a)(2)(B).

(e) Estimated Cost.

It is early in the litigation, but Counsel for Defendants Athens Vascular Surgery, P.C., Dr. Sailors and Dr. Costantino estimate that their discovery costs will be approximately $75,000. Counsel for the Hospital Authority of

Clark County d/b/a Athens Regional Medical Center, Athens Regional Medical Center, Inc. and Athens Regional Health Services, Inc. estimate that their discovery costs will be approximately $80,000. Counsel for Plaintiffs estimates that discovery will cost approximately $50,000.00.

III. ADDITIONAL INFORMATION

(a) Lead Counsel Designation.

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(b) The parties REQUEST a scheduling conference in this matter to discuss the Plaintiffs' intention to conduct thirty-two (32) depositions and Defendants' objections to the propriety of those depositions. The Court grants the parties' request for a scheduling conference to resolve the issue of the number of depositions that each party will

be allowed to take without leave of court. The parties will be contacted by the Court's courtroom deputy clerk to schedule the conference.

SO ORDERED this 19th day of October, 2004.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

AZEEZ P. ADEDUNTAN,
VICTORY VASCULAR & GENERAL
SURGERY OF GEORGIA, P.C.

Plaintiffs,

vs. CASE NO. 3:04-CV-65 (CDL)

HOSPITAL AUTHORITY OF CLARKE
COUNTY d/b/a ATHENS REGIONAL
MEDICAL CENTER, et al.,

Defendants.

ORDER

Plaintiffs move the Court to amend the scheduling order to allow Plaintiffs additional time to identify expert witnesses if necessary. The present discovery period is scheduled to expire on February 28, 2006 with dispositive motions due on April 14, 2006. Plaintiffs maintain that due to scheduling conflicts beyond their control, they need additional time to identify expert witnesses. Defendants do not object to providing Plaintiffs with additional time to identify experts as long as it does not extend the discovery period and result in an extension of the dispositive motion deadline.

Having reviewed Plaintiffs' motion and Defendants' response, the Court finds that some extension of the discovery period is warranted. The Court therefore extends the discovery period to March 31, 2006. Plaintiffs shall identify any experts on or before March 17, 2006 and shall make any such experts available for deposition prior to March 31, 2006. Defendants shall have until April 14, 2006 to identify their experts. If Defendants identify no experts, dispositive motions shall be filed on or before April 28, 2006. If Defendants identify an expert, the discovery period shall be extended through April 28, 2006 to permit Plaintiffs to depose Defendants' expert, and dispositive motions shall be due on or before May 12, 2006.

The existing scheduling order shall be amended as set forth hereinabove.

IT IS SO ORDERED, this 15th day of February, 2006.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE